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SHOULD CLERGY HOLD THE PRIEST-PENITENT PRIVILEGE?

I. INTRODUCTION

On April 22, 1996, the Reverend Timothy Mockaitis, a Catholic priest of the archdiocese of Portland, Oregon, reported to jail.¹ Conan Hale, a suspect in a brutal triple homicide, had requested the presence of a Catholic priest so he could make a confession, and Father Mockaitis complied.²

Unbeknownst to Fr. Mockaitis, however, the officials at the Lane County Adult Corrections Facility were recording his conversation with Mr. Hale, and forwarded the tape to the office of the Lane County District Attorney, Doug Harclerod. Two deputy district attorneys listened to it, and the tape was transcribed.³

It soon became known to the press and the public that Hale's confession had been recorded,⁴ and the reaction was swift.⁵ Portland archdiocesan officials immediately petitioned to have the tape destroyed and attempted to secure a guarantee that prison officials would not record any further sacramental confessions.⁶ After the state trial court denied its motion, the archdiocese filed a civil rights claim in federal court. After a district court refused to exercise jurisdiction over the case, archdiocesan officials appealed to the United States Court of Appeals for the Ninth Circuit, alleging, among other things, that Fr. Mockaitis's constitutional rights had been violated.⁷

A three-judge panel agreed. The court held that the state had violated Fr. Mockaitis's reasonable expectation of privacy in his communications with Mr. Hale, given the recognition under Oregon law for the "member of clergy-penitent privilege" and the "uniform respect" for the "[inviolable] character of sacramental confession" shown through-

1. See *Mockaitis v. Harclerod*, 104 F.3d 1522, 1524 (9th Cir. 1997).

2. See *id.* at 1525.

3. See *id.*

4. See *id.* at 1526.

5. See Lori Lee Brocker, *Sacred Secrets: The Clergy-Penitent Privilege Finds Its Way into the News*, 57 OR. ST. B. BULL. 15 (Oct. 1996).

6. See *Mockaitis*, 104 F.3d at 1526.

7. See *id.*

out the "history of the nation."⁸ The court also relied on the Religious Freedom Restoration Act (RFRA)⁹ in concluding that Oregon had violated Fr. Mockaitis's right to the free exercise of his religion.¹⁰

This Comment seeks to answer some of the many questions raised by the Ninth Circuit's decision in *Mockaitis*.¹¹ May a member of the clergy claim the priest-penitent privilege¹² on his or her own behalf? In

8. *Id.* at 1531-32.

9. 42 U.S.C. § 2000bb (1994).

10. *See Mockaitis*, 104 F.3d at 1528-31.

11. An interesting question posed by the *Mockaitis* case lies outside the scope of this Comment, but deserves a brief mention nonetheless because of the issues it raises: Did Mr. Hale's confession qualify, under canon law, as a bona fide confession in the first place? In other words, might there have been no legally actionable question of confidentiality from the beginning?

Judge Noonan, author of the Ninth Circuit panel's opinion in *Mockaitis*, claims that "in Catholic belief all baptized persons are eligible to participate in the Sacrament of Penance." *Mockaitis*, 104 F.3d at 1525. The Code of Canon Law, which governs Catholic sacramental practice, does not contain any phrase nearly as expansive as Judge Noonan's. The pertinent canon, 844, §4, states that Catholic ministers may licitly administer the sacrament of penance to Christians who are neither Catholic nor Eastern Orthodox "who do not have full communion with the Catholic Church" provided they (1) are in danger of death or have some other grave need for the sacrament, (2) cannot approach a minister of their own community, (3) ask for the sacrament on their own, (4) manifest "Catholic faith" in the sacrament, and (5) are "properly disposed." THE CODE OF CANON LAW: A TEXT AND COMMENTARY 609-11 (James A. Coriden et al. eds., 1985).

Noonan states that Hale was "a baptized Christian," but not Catholic. 104 F.3d at 1525. Why, then, did Hale ask for a Catholic priest to go to confession if he was not Catholic? The answer to this question may be more apparent if one believes Jeffrey James Carley, a detective in the Lane County sheriff's office, who swore in a search warrant affidavit that Hale knew his conversations with visitors were being recorded. *See id.* Given the self-exculpatory nature of Hale's "confession" to Fr. Mockaitis and his subsequent willingness to have the taped confession given to his defense attorneys, *see id.* at 1527, it is certainly possible to conclude that Hale was simply using the sacrament for his own purposes.

According to one commentator, the sacramental seal of the confessional does not exist if a person "approaches the priest with the intention of deceiving him or of making fun of the sacrament." WILLIAM H. WOESTMAN, O.M.I., SACRAMENTS: INITIATION, PENANCE, ANOINTING OF THE SICK 265 (1992). If this is true, Fr. Mockaitis might not have owed Mr. Hale any obligation of confidentiality to begin with.

12. Scholars differ on the precise title of this privilege. *See* 26 CHARLES ALAN WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5612, 27-28 (1992). Professors Wright and Graham note that the traditional title of "priest-penitent" is not completely accurate, as the privilege is no longer limited to priests and because the communication itself does not have to be of a strictly penitential nature for it to be privileged. *See id.*

Wright and Graham contend the term "clergy" as a replacement for "priest" is not "particularly euphonious," *id.* at 28, and propose to replace the traditional title with "the penitent's privilege." *Id.* at 29. That phrase, however, seems problematic for two reasons. First, it still does not acknowledge that modern courts recognize non-penitential communications made to members of the clergy. Second, the phrase begs the question this Comment seeks to

light of the Supreme Court's recent ruling in *City of Boerne v. Flores*,¹³ which struck down RFRA in part, if not entirely,¹⁴ does the Free Exercise Clause protect a member of the clergy from being required to reveal the contents of a confidential communication?¹⁵ Does the Establishment Clause pose any problems for an expansive view of the privilege?

As a backdrop for answering these questions, Part II of this Comment sketches the basic outline of the evolution of the priest-penitent privilege in the United States and its current status in state and federal courts.¹⁶ Part III then discusses the right of a member of the clergy to assert the privilege under the Free Exercise Clause of the First Amendment, and answers the Establishment Clause objection to this interpretation of the privilege. The conclusion contains a proposal arguing for the privilege's expansion.

II. EVOLUTION AND CURRENT STATUS OF THE PRIEST-PENITENT PRIVILEGE

The Federal Rules of Evidence direct federal courts to begin with the common law when determining whether to recognize a privilege.¹⁷

answer: Who holds the privilege? Because a more precise appellation has not yet gained widespread acceptance, this Comment refers to the privilege by its traditional title.

13. 117 S. Ct. 2157, 2170-71 (1997) (holding RFRA was too broad in scope and that it exceeded Congress's power under Section Five of the Fourteenth Amendment).

14. See *infra* note 145.

15. The arena in which members of the clergy are subject to compelled testimony is larger than courtrooms, especially in light of the advent of mandatory reporting laws concerning various forms of abuse. This Comment concerns the rights of clergy in all testimonial situations. For a further treatment of mandatory reporting laws and the rights of clergy, see Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987). See also Jill D. Moore, Comment, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063 (1995).

16. For a more comprehensive treatment of the history of the privilege, see generally WRIGHT & GRAHAM, *supra* note 12, at § 5612; JOHN C. BUSH & WILLIAM HAROLD TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW* 33-90 (3d ed. 1989); Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 96-108 (1983).

17. FED. R. EVID. 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness [or] person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Thus, it is important to identify the extent to which the common law recognized the priest-penitent privilege. And because much of the common law regarding this privilege grew out of the canon law of the Catholic Church,¹⁸ the analysis must begin there.

A. The Privilege's Origins in Canon Law

The practice of confession has had a long tradition in Christian thought and practice, dating back to the New Testament¹⁹ and the early Christian communities.²⁰ The first explicit papal order aimed at violators of the seal of the confessional appeared at the end of the ninth century,²¹ and a formal canon promulgated after the Fourth Lateran Council in 1215 imposed a strict obligation of secrecy on the entire Church:

Let the priest absolutely beware that he does not by word or sign or by any manner whatever in any way betray the sinner: but if he should happen to need wiser counsel let him cautiously seek the same without any mention of person. For whoever shall dare to reveal a sin disclosed to him in the tribunal of penance we decree that he shall be not only deposed from the priestly office, but that he shall also be sent into the confinement of a monastery to do perpetual penance.²²

18. See Yellin, *supra* note 16, at 97; Mitchell, *supra* note 15, at 735.

19. See Acts 19:18-19: "Many of those who had become believers came forward and openly acknowledged their former practices. Moreover, a large number of those who had practiced magic collected their books and burned them in public. They calculated their value and found it to be fifty thousand silver pieces." See also James 5:16: "Therefore, confess your sins to one another and pray for one another, that you may be healed. The fervent prayer of a righteous person is very powerful."

20. Theodore of Mopsuestia, a fifth century theologian, acknowledged the confidential nature of confessional communications this way:

It behooves us, therefore, to draw near to the priests in great confidence and to reveal to them our sins; and those priests, with all diligence, solicitude, and love, and in accord with the regulations . . . will grant healing to sinners. [The priests] will not disclose the things that ought not be disclosed; rather, they will be silent about the things that have happened, as befits true and loving fathers who are bound to guard the shame of their children while striving to heal their bodies.

2 WILLIAM A. JURGENS, THE FAITH OF THE EARLY FATHERS 83-84 (1979). In letters to bishops, Pope St. Leo I, bishop of Rome from 440 to 461, both recommended the practice of private confession and ordered confessors to stop revealing penitents' sins publicly. See 3 WILLIAM A. JURGENS, THE FAITH OF THE EARLY FATHERS 272-73 (1979).

21. See BUSH & TIEMANN, *supra* note 16, at 44 (noting that priests who violated the seal were to be removed from office and sent into lifelong exile).

22. R.S. Nolan, *The Law of the Seal of Confession*, in 13 THE CATHOLIC

The prohibition against breaking the seal of the confessional has persisted throughout the centuries. The current Code of Canon Law of the Catholic Church still obliges those who come to know of penitential communications to keep them confidential:

The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason. An interpreter, if there is one present, is also obliged to preserve the secret, and also all others to whom knowledge of sins from confession shall come in any way.²³

Canon Law also forbids church authorities from using knowledge of sins obtained in the confession for the external governance of the church.²⁴ The penalty for any direct violation of the seal of the confessional is automatic excommunication.²⁵

This long tradition of the confidentiality of penitential communications, evident in canon law and the practice of various faith communities, shows not only the foundation on which the common law based its approval of the privilege, but provides a strong basis for an argument that at least certain members of the clergy have a well-founded belief in their obligation to keep certain communications secret.²⁶

B. The Privilege at Common Law

1. In England

How deep are the roots of this privilege in the common law of England? Scholars disagree. Some claim authoritatively, generally relying on Wigmore, that the priest-penitent privilege either did not exist at all under the common law, or that it disappeared after the Protestant Reformation.²⁷ Others, however, are less emphatic about the privilege's

ENCYCLOPEDIA 649 (Charles G. Herbermann et al. eds., 1912).

23. 1983 CODE c.983, §§ 1, 2.

24. See 1983 CODE c.984, §§ 1, 2.

25. See 1983 CODE c.1388 §§ 1, 2.

26. See *infra* Part III.

27. See, e.g., Mitchell, *supra* note 15, at 736 ("[T]he law [after the Reformation] ceased to recognize the clergy privilege."); Yellin, *supra* note 16, at 101 ("[W]hile the privilege may have existed in the common law of England before the Reformation, the virtually unanimous opinion is that the privilege ceased to exist after the Reformation."); Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L.

non-existence and highlight the subtleties in Wigmore's argument.²⁸

Those holding that the privilege was recognized at common law point to its ancient origins in Anglo-Saxon law. They cite decrees of certain Anglo-Saxon rulers showing respect for the practice of confession, and infer that the secrecy surrounding the sacrament would also have been respected, given the close connection between the laws of the Catholic Church and the laws governing Anglo-Saxons.²⁹ They further argue that although the Battle of Hastings may have changed the face of England, it did not disturb the privilege, and to that effect, they quote a law of Henry I, son of William the Conqueror and king of England from 1100-1135: "Priests should guard that they not reveal to acquaintances or strangers what has been confessed to them by those who come for confession; for if they do it, even in good faith, they will be sentenced to live all the days of their life as an honorless pilgrim."³⁰

Although further documentary evidence of the privilege's existence before the sixteenth century is limited and ambiguous,³¹ a circumstantial argument is perhaps more persuasive. Given the congruence between the laws of the land and the laws of the Church in a Christian country such as England, it is highly unlikely that Christian judges and lawyers would either compel a priest to break the seal of the confessional or make use of any confidential communication, as the judges and lawyers

REV. 225, 230 (1998) ("This privilege lost its recognition following the Protestant Reformation in England."); Chad Horner, Note, *Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society*, 45 DRAKE L. REV. 697, 701 (1997) ("At common law, English law did not recognize the privilege . . ."); John J. Montone, III, Comment, *In Search of Forgiveness: State v. Szemple and the Priest-Penitent Privilege in New Jersey*, 48 RUTGERS L. REV. 263, 268 (1995) ("Scholars . . . are certain that common law courts did not recognize a privilege for clergymen following the rise of the Anglican Church."); Julie Ann Sippel, Comment, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127, 1130 (1994) ("[T]he priest-penitent privilege was not recognized at common law . . .").

28. See, e.g., WRIGHT & GRAHAM, *supra* note 12, § 5612, at 29 n.28 ("The authority cited in support of this proposition [that there was no penitent's privilege at common law] is seldom impressive . . ."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE § 5.38, at 632 (1995) ("While there was skepticism as to the existence of this privilege in some early English cases, it seems that this skepticism was a function of religious contentiousness of the post-Reformation era rather than a real indication of the eclipse of the privilege.") (citations omitted).

29. See, e.g., Nolan, *supra* note 22, at 649; BUSH & TIEMANN, *supra* note 16, at 47-48. But see WRIGHT & GRAHAM, *supra* note 12, § 5612, at 36 (noting that "none of the quoted laws deals with the seal of the confessional, much less the privilege").

30. BUSH & TIEMANN, *supra* note 16, at 48-49 (citation omitted). But see WRIGHT & GRAHAM, *supra* note 12, § 5612, at 36 (asking whether the king considered himself to be an "acquaintance" or "stranger").

31. See WRIGHT & GRAHAM, *supra* note 12, § 5612, at 37-39.

were subject to the same ecclesiastical penalties.³²

What happened to the privilege after the Reformation? Wigmore claims that although English courts continued to recognize the privilege even after King Henry VIII's break with Rome in 1531, the privilege ceased to exist after the Restoration of the monarchy in 1660, and he uses a dozen cases to support his conclusion.³³ Wright and Graham find his efforts unconvincing, and point to the weak foundation these twelve cases provide.³⁴

Wright and Graham suggest that at least four of Wigmore's twelve "cases," and possibly as many as seven, are nothing more than dicta.³⁵ They also indicate that two of Wigmore's cases are from trial courts, and that the precedential value of another case was completely rejected in the nineteenth century by a respected English evidence scholar.³⁶ Wright and Graham also assert that one of Wigmore's two "decisive rulings," *Normanshaw v. Normanshaw*,³⁷ appears much too late (1893) to have influenced the common law in the United States, and long after commentators were claiming no privilege existed.³⁸ The final case involves a court in Ireland in 1802 deciding the property rights of an Irish Catholic. This is, Wright and Graham comment, "a bit like using current practices in Northern Ireland as evidence of the English law of civil rights," and is hardly a reliable footing on which to ground an absolute claim that the priest-penitent privilege did not exist at English common law.³⁹

In light of this historical controversy, perhaps the most accurate conclusion one can draw is that whether the privilege existed under English common law "has never been solemnly decided."⁴⁰ And while there is still no statutory recognition of the privilege in England,⁴¹ other European countries have for many years formally recognized it.⁴²

32. See *id.* at 36.

33. "But since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of [the priest-penitent] privilege." 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2394, at 869 (McNaughton rev. 1961).

34. See WRIGHT & GRAHAM, *supra* note 12, § 5612, at 39-41.

35. See *id.* at 39 n.98.

36. See *id.* at 40.

37. 69 L.T.R. 468 (P.D. & A. 1893), quoted in Yellin, *supra* note 16, at 103 n.41.

38. See WRIGHT & GRAHAM, *supra* note 12, § 5612, at 40 n.105.

39. *Id.* at 40-41 n.107.

40. *Id.* at 41 n.108.

41. See Yellin, *supra* note 16, at 103.

42. An influential law review article in the 1960s noted the widespread acceptance of

2. In the United States

In the United States, very few cases have denied the existence of a priest-penitent privilege.⁴³ Once again, however, Wigmore is often cited as the source for an authoritative declaration that the privilege did not exist at common law in this country.⁴⁴ And once again, a careful reading of the cases Wigmore cites casts doubt on his claim.

Wigmore asserts that "the privilege cannot be said to have been recognized as a rule of the common law . . . in the United States."⁴⁵ Wright and Graham maintain that this is true only in a certain, limited sense, for "it also 'cannot be said' that the privilege was *not* recognized" at common law in the United States.⁴⁶ To support his claim, Wigmore refers to only three cases, and none of these is dispositive because of their peculiar fact situations. One case involved a public confession before members of a congregation, not a private communication to a cleric.⁴⁷ A second case involved a statement to a Salvation Army officer, which the court simply presumed would have been protected had the privilege existed.⁴⁸ The third case involved a witness testifying to what he heard a priest tell a penitent in confession.⁴⁹ These cases hardly provide a sufficient foundation on which to base a claim that the privilege was not recognized under the common law of the United States.

Whether federal courts recognize the privilege depends entirely on common law, as Congress has refrained from providing any statutory recognition of privileges in general.⁵⁰ On at least two occasions, the United States Supreme Court has expressed not only its approval of the privilege, but has testified to its existence at common law as well.

the privilege on the European continent. See Seward Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55, 56-57 (1963). Reese noted that Austria, as one example, rendered void testimony from "ministers in regard to facts that were communicated to them either during confession or under the seal of secrecy." *Id.* at 57 n.9.

43. See WRIGHT & GRAHAM, *supra* note 12, § 5612, at 43.

44. See, e.g., Mitchell, *supra* note 15, at 737 ("[A] clergy privilege was not part of the common law imported into this country. . ."); Colombo, *supra* note 27, at 231 ("[T]he common law that the United States inherited did not include the clergy-penitent privilege."); Sippel, *supra* note 27, at 1130 ("[T]he priest-penitent privilege was not recognized at common law . . .").

45. WIGMORE, *supra* note 33, at 870-71.

46. WRIGHT & GRAHAM, *supra* note 12, § 5612, at 43 n.123 (emphasis added).

47. See *Commonwealth v. Drake*, 15 Mass. 161, 162 (1818).

48. See *State v. Morehous*, 117 A. 296, 300 (N.J. 1922), *overruled in part by State v. Smith*, 161 A.2d 520 (N.J. 1960).

49. See *Bahrey v. Poniatishin*, 112 A. 481, 481 (N.J. 1920).

50. See *supra* note 17.

In *Totten v. United States*,⁵¹ the Supreme Court held that public policy precluded the maintenance of any suit which would "lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."⁵² Although *Totten* dealt with a case involving national secrets, the Court indicated in dictum that "suits cannot be maintained which would require a disclosure of the confidences of the confessional. . . ."⁵³ This passage is significant, because it shows the nation's highest court viewed the privilege favorably as early as 1875, even in the absence of statutory authority.

The Court again addressed the priest-penitent privilege in *United States v. Nixon*,⁵⁴ noting that while communications between presidents and their staffs may not be privileged, communications with a priest may be: "[G]enerally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence."⁵⁵

As recently as 1980, the Supreme Court again affirmed its support for the privilege in *Trammel v. United States*.⁵⁶ In its discussion of the marital privilege, the Court noted in dictum that the other evidentiary privileges protecting private communications between a "priest and penitent, attorney and client, and physician and patient . . . are rooted in the imperative need for confidence and trust."⁵⁷ In particular, "[t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."⁵⁸ Now that the Supreme Court has extended a privilege to confidential communications between psychotherapists (in-

51. 92 U.S. 105 (1875).

52. *Id.* at 107.

53. *Id.*

54. 418 U.S. 683 (1974).

55. *Id.* at 709. The Court went on to say:

These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

Id. at 709-10.

56. 445 U.S. 40 (1980).

57. *Id.* at 51.

58. *Id.*

cluding even "licensed social workers") and their patients,⁵⁹ the recognition of the more established priest-penitent privilege seems quite secure, at least in the federal courts.⁶⁰

Some scholars have argued that state courts, on the other hand, have never had the opportunity to develop fully the privilege under the common law. Advocates of this position point to several instances in which a trial court's refusal to recognize the privilege of a member of the clergy led to quick legislative action.⁶¹ Nevertheless, there are cases that show support for the priest-penitent privilege, even before state legislatures began to act.

The earliest and most influential of these cases is *People v. Phillips*.⁶² In *Phillips*, Fr. Anthony Kohlmann, pastor of St. Peter's Catholic Church, had returned some stolen goods to their rightful owner, a Mr. James Cating. When pressed to identify the person who had given him the property to return, Fr. Kohlmann refused, citing the seal of the confessional.⁶³

The Court of General Sessions of the City of New York refused to compel the priest to testify, rooting its decision in the "benevolent and just principles of the common law," which prevented a witness from being placed between the "Scylla" of violating his religious oath and suffering the attached penalties and the "Charybdis" of criminal punishment.⁶⁴ The court also based its decision "upon the ground of the constitution, of the social compact, and of civil and religious liberty."⁶⁵ Significantly, the court relied not only on the constitution of the state of New York, but also on the Free Exercise Clause of the First Amendment:

59. See *Jaffee v. Redmond*, 116 S. Ct. 1223, 1996-1 (1996).

60. A number of recent federal decisions have favored the privilege. See, e.g., *In re Grand Jury Investigation*, 918 F.2d 374, 384 (3d Cir. 1990); *Mullen v. United States*, 263 F.2d 275, 277 (D.C. Cir. 1958); *Eckmann v. Board of Educ.*, 106 F.R.D. 70, 72-73 (E.D. Mo. 1985); *In re Verplank*, 329 F. Supp. 433, 436 (C.D. Cal. 1971).

61. See *WRIGHT & GRAHAM*, *supra* note 12, § 5612, at 43 n.129; see also *Yellin*, *supra* note 16, at 107-08.

62. The case, though not officially reported, was set forth by one of the attorneys who participated in the case as *amicus curiae* and reprinted in WILLIAM SAMPSON, *THE CATHOLIC QUESTION IN AMERICA* (1813). The case was reprinted again in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955) [hereinafter *Privileged Communications*].

63. See *Privileged Communications*, *supra* note 62, at 200.

64. *Id.* at 201-02.

65. *Id.* at 206.

It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements. We have but two in the Protestant Church—Baptism and the Lord's Supper—and they are considered the seals of the covenant of grace. Suppose that a decision of this court, or a law of the state should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed? Every man who hears me will answer in the affirmative. Will not the same result follow, if we deprive the Roman catholic [sic] of one of his ordinances? Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic [sic] religion would be thus annihilated.⁶⁶

Another New York court relied on *Phillips* in another case just four years later. In *People v. Smith*,⁶⁷ a Protestant minister was asked to reveal the communication made to him by a murder suspect. The court distinguished *Phillips* on the grounds that the defendant had approached the minister as a "friend or adviser" and not in his capacity as a professional, and that the minister voiced no objection to testifying.⁶⁸

C. Statutory Expansion of the Privilege

Soon after these decisions, the New York legislature enacted the first statute of its kind in the United States.⁶⁹ Some have argued that the New York legislature intended to extend the privilege to non-Catholic ministers after the *Smith* ruling limited the privilege to Catholic priests.⁷⁰ A close reading of the holding in *Smith*, however, indicates that the judge in that case appears simply to have limited the privilege in the same manner as the legislature did, in holding that (1) the com-

66. *Id.* at 207.

67. 2 City Hall Recorder (Rogers) 77 (N.Y. 1817), reprinted in *Privileged Communications*, *supra* note 62, at 209-13.

68. *Privileged Communications*, *supra* note 62, at 211.

69. The 1828 statute reads as follows: "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." (quoted in WRIGHT & GRAHAM, *supra* note 12, § 5612, at 46-47 n.152).

70. See, e.g., Yellin, *supra* note 16, at 106.

munication must have been both professional in nature and compelled by religious obligation, and (2) the communication did not simply arise within the bonds of friendship.⁷¹

In any case, other states began to follow the example of the New York legislature.⁷² By 1904, twenty-five states had enacted a statutory privilege.⁷³ By 1963, forty-four states had the privilege.⁷⁴ Today, all fifty states have enacted statutes recognizing the privilege.⁷⁵

The scope of these statutes varies considerably,⁷⁶ and a detailed

71. See WRIGHT & GRAHAM, *supra* note 12, § 5612, at 47.

72. See *id.*

73. See *id.*

74. See Yellin, *supra* note 16, at 108.

75. See ALA. R. EVID. 505; ALASKA R. EVID. 506; ARIZ. REV. STAT. ANN. § 13-4062 (West 1989); ARK. R. EVID. 505; CAL. EVID. CODE §§ 1030-1034 (West 1995); COLO. REV. STAT. ANN. § 13-90-107(1)(c) (West 1997); CONN. GEN. STAT. ANN. § 52-146b (West 1991); DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West Supp. 1998); GA. CODE ANN. § 24-9-22 (1995); HAW. R. EVID. 506; IDAHO CODE § 9-203(3) (Supp. 1997); 735 ILL. COMP. STAT. 5/8-803 (West 1992); IND. CODE ANN. § 34-46-3-1 (Michie 1998); IOWA CODE ANN. § 622.10 (West Supp. 1998); KAN. STAT. ANN. § 60-429 (1994); KY. R. EVID. 505; LA. CODE EVID. ANN. art. 511 (West 1995); ME. R. EVID. 505; MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1989); MASS. GEN. LAWS ch. 233, § 20A (1986); MICH. COMP. LAWS ANN. § 600.2156 (West 1986); MINN. STAT. ANN. § 595.02(1)(c) (West Supp. 1998); MISS. CODE ANN. § 13-1-22 (Supp. 1997); MO. ANN. STAT. § 491.060(4) (West 1996); MONT. CODE ANN. § 26-1-804 (1997); NEB. REV. STAT. § 27-506 (1995); NEV. REV. STAT. ANN. § 49.255 (Michie 1996); N.H. REV. STAT. ANN. § 516:35 (1997); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1998); N.M. R. EVID. 11-506; N.Y. C.P.L.R. 4505 (Consol. 1978); N.C. GEN. STAT. § 8-53.2 (1996); N.D. R. EVID. 505; OHIO REV. CODE ANN. § 2317.02(C) (Anderson Supp. 1998); OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); OR. REV. STAT. § 40.260 (1997); 42 PA. CONS. STAT. ANN. § 5943 (West 1982); R.I. GEN. LAWS § 9-17-23 (1997); S.C. CODE ANN. § 19-11-90 (Law Co-op. 1985); S.D. CODIFIED LAWS §§ 19-13-16 to 19-13-18 (Michie 1995); TENN. CODE ANN. § 24-1-206 (Supp. 1997); TEX. R. EVID. 505; UTAH CODE ANN. § 78-24-8(3) (1997); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 8.01-400 (Michie Supp. 1997); WASH. REV. CODE ANN. § 5.60.060(3) (West Supp. 1998); W. VA. CODE § 57-3-9 (1997); WIS. STAT. § 905.06 (1995-96); WYO. STAT. ANN. § 1-12-101(a)(ii) (Michie 1997).

76. The text of the proposed federal rule on the priest-penitent privilege reads as follows:

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who May Claim the Privilege. The privilege may be claimed by the person, by

study of them is beyond the scope of this Comment.⁷⁷ Thus, the examination that follows will focus solely on how the various states treat the holder of the privilege: namely, (1) Who qualifies as a "member of the clergy?" and (2) Who holds the privilege?

1. Who Qualifies as a "Member of the Clergy?"

While some statutes list by title those clergy included in the privilege,⁷⁸ others are less specific.⁷⁹ Legislatures have generally left to the courts the difficult task of applying their general definitions to specific situations.⁸⁰ One possible justification for vagueness in many statutes is

his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

Reprinted in MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 506 (4th ed. 1996). This rule, though ultimately rejected by Congress, was used as a model by a number of states. *See infra* note 110.

77. *See* WRIGHT & GRAHAM, *supra* note 12, §§ 5615-19, for a detailed treatment of the elements of the privilege not covered here (e.g., what is a "confidential" communication? what types of "communications" are covered?). *See also* Yellin, *supra* note 16, at 114-37.

78. *See, e.g.*, GA. CODE ANN. § 24-9-22 (1995) (extending privilege to Protestant ministers, Roman Catholic or Greek Orthodox priests, Jewish rabbis, and Christian or Jewish ministers "by whatever name called"); N.Y. C.P.L.R. 4505 (Consol. 1978) (defining a "member of the clergy" as "a clergyman or other minister of any religion or duly accredited Christian Science practitioner"); TENN. CODE ANN. § 24-1-206 (Supp. 1997) (providing that "no minister of the gospel, no priest of the Catholic Church, no rector of the Episcopal Church, no ordained rabbi, and no regular minister of religion of any religious organization or denomination usually referred to as a church" be allowed or required to testify under certain conditions, and imposing even criminal penalties on violators of this ban); WIS. STAT. § 905.06(1)(a) (1995-96) (defining a "member of the clergy" as "a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.").

79. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4062 (West 1989) (extending the privilege to a "clergyman or priest"); WASH. REV. CODE ANN. § 5.60.060(3) (West Supp. 1998) (extending the privilege to a "member of the clergy or a priest").

80. *See, e.g.*, *State v. MacKinnon*, 957 P.2d 23, 27-28 (Mont. 1998); *State v. Szemple*, 622 A.2d 248, 254 (N.J. Super. Ct. App. Div. 1993), *aff'd* 640 A.2d 817 (N.J. 1994); *State v. Buss*, 887 P.2d 920, 923 (Wash. Ct. App. 1995); *Scott v. Hammock*, 870 P.2d 947, 951-52 (Utah 1994); *Reutkemeier v. Nolte*, 161 N.W. 290 (Iowa 1917). In *Reutkemeier*, the court asked:

What is a "minister of the Gospel" within the meaning of this statute? The law as such sets up no standard or criterion. That question is left wholly to the recognition of the "denomination." The word "minister," which in its original sense meant a mere servant, has grown in many directions and into much dignity. Few English words have a more varied meaning. In the religious world it is often, if not generally, used as referring to a pastor of the church and a preacher of the Gospel. This meaning, however, is not applicable to all Christian denominations. Some of them have no pastors and recognize no one as a minister in that sense, and yet all de-

that a more specific list of "acceptable" members of the clergy might trigger a constitutional attack on the basis of religious discrimination or perhaps even as a violation of the Establishment Clause.⁸¹

Most statutes imply that a member of the clergy must be connected in some way with a religious organization.⁸² While certain titles suggest such a link,⁸³ some statutes require more. One state demands the member of the clergy be "settled in the work of the ministry,"⁸⁴ and that he or she be "accredited by"⁸⁵ a church body before the privilege can be invoked. Other states hold the clergy member must be "accountable to the authority of"⁸⁶ a church body, which some states go on to say must have certain characteristics,⁸⁷ be "legally cognizable,"⁸⁸ or be part of an "organized" religion.⁸⁹

Faced with these thorny dilemmas, courts often simply concede that a person is a minister of a church, and will instead focus on whether the minister's church requires the communication to be kept confidential.⁹⁰ A New Jersey court ruled, for example, that a communication to a Catholic nun fell outside the statute, and held her in contempt of court for refusing to testify.⁹¹ The court based its conclusion on two grounds: (1) its own interpretation of Catholic doctrine and practice concerning

nominations recognize the spiritual authority of the church and provide a source of spiritual advice and discipline.

Id. at 292.

81. See Yellin, *supra* note 16, at 120; see also *MacKinnon*, 957 P.2d at 28 (adopting a broad reading of the privilege so as "to minimize the risk that [the statute] might be discriminatorily applied because of differing judicial perceptions of a given church's practices or religious doctrine").

82. See Mitchell, *supra* note 15, at 743-44.

83. "Priest" with Catholicism and "rabbi" with Judaism, for instance.

84. CONN. GEN. STAT. ANN. § 52-146b (West 1991).

85. *Id.*

86. OHIO REV. CODE ANN. § 2317.02(C) (Anderson Supp. 1998).

87. See, e.g., KAN. STAT. ANN. § 60-429 (1994) ("established on the basis of a community of faith and belief, doctrines and practices of a religious character"); see also *Foundation of Human Understanding v. Commissioner*, 88 T.C. 1341, 1358 (1987) (listing fourteen criteria the Internal Revenue Service uses when determining whether an organization is a church).

88. OHIO REV. CODE ANN. § 2317.02(C) (Anderson Supp. 1998).

89. MO. ANN. STAT. § 491.060(4) (West 1996). See also *Manous v. State*, 407 S.E.2d 779, 782 (Ga. Ct. App. 1991) (refusing to recognize a psychic under the state's privilege statute).

90. See Yellin, *supra* note 16, at 117; see also *State v. MacKinnon*, 957 P.2d 23, 27 (Mont. 1998). But see *State v. Motherwell*, 788 P.2d 1066, 1069 (Wash. 1990) (distinguishing between ordained and non-ordained ministers).

91. See *In re Murtha*, 279 A.2d 889 (N.J. Super. Ct. App. Div. 1971).

the nun's activities, and (2) the legislative history surrounding the expansion of the privilege in New Jersey.⁹²

Other courts, however, have allowed for a greater expansion of the privilege.⁹³ In *Eckmann v. Board of Education*,⁹⁴ for example, a federal district court held communications to a nun were privileged because she had been acting in her capacity as a spiritual advisor.⁹⁵ The Oklahoma Supreme Court has held that a nun could qualify as a "clergyman" under the state's privilege statute.⁹⁶ And a New York court recently acknowledged that a priest-penitent privilege might exist between a Muslim and an advisor of the Muslim faith under certain circumstances.⁹⁷ In the wake of changes in the religious experience of the American people, from a decline in priestly vocations to the influence of non-Western religions, courts will likely address this question of what qualifies someone to be a member of the clergy with even greater frequency.⁹⁸

2. Who Holds the Privilege?

The holder of an evidentiary privilege has the power to invoke or waive it, either refusing or allowing courts to gain access to confidential communications.⁹⁹ Clients, not their attorneys, control the decision to reveal private confidences made to them in the course of the attorney-client relationship.¹⁰⁰ In many jurisdictions, patients enjoy the right to act as "holder" of the "doctor-patient" privilege, and may either allow or prevent medical professionals from testifying to certain statements made in the course of their treatment.¹⁰¹ And the U.S. Supreme Court has recently acknowledged the right of patients to prevent psychotherapists and licensed social workers from revealing certain confidential communications.¹⁰²

92. See *id.* at 891-93.

93. West Virginia, for example, explicitly provides for nuns in its privilege statute. W. VA. CODE § 57-3-9 (1997). See also Sister Simone Campbell, SSS, *Catholic Sisters, Irregularly Ordained Women and the Clergy-Penitent Privilege*, 9 U.C. DAVIS L. REV. 523, 540-42 (1976).

94. 106 F.R.D. 70 (E.D. Mo. 1985).

95. See *id.* at 72-73.

96. See *Masquat v. Maguire*, 638 P.2d 1105, 1106 (Okla. 1981).

97. See *People v. Johnson*, 497 N.Y.S.2d 539, 539 (App. Div. 1985).

98. See Horner, *supra* note 27, at 711-12.

99. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 439 (3d ed. 1996).

100. See *id.* at 452.

101. See *id.* at 480.

102. See *Jaffee v. Redmond*, 116 S. Ct. 1223, 1231-32 (1996).

These commonly accepted evidentiary privileges, although similar to the priest-penitent privilege, can be distinguished from it in at least three significant ways. First, the foundations of the priest-penitent privilege are uniquely religious in nature, resting historically on the canon law of the Catholic Church.¹⁰³ Second, the priest-penitent privilege has generally been considered absolute, prohibiting any revelation of the protected communication, unlike the other evidentiary privileges with their numerous exceptions.¹⁰⁴ Finally, and most importantly for this discussion, the priest-penitent privilege often directly affects a *religious* obligation of the one receiving the communication, as opposed to the merely civic duties of lawyers and doctors. Important as the civic duties of client loyalty and patient confidentiality might be, and as significant as the social goods that result from such policies, the obligations of secrecy upon lawyers and doctors do not carry the same weight—nor, arguably, merit the same degree of constitutional protection—as the sacred obligations that fall upon members of the clergy.¹⁰⁵

In this sense, the priest-penitent privilege is more like the spousal privilege, which has also enjoyed widespread recognition in the courts under both common law and modern statutes.¹⁰⁶ Many courts have allowed either spouse to exercise or waive the privilege, due at least in part to the recognition that one of the purposes of the spousal privilege is to prevent court-sponsored damage to the socially useful, private, and even sacred relationships between husbands and wives.¹⁰⁷ If it became known throughout society that only one spouse could reveal marital communications, the unfavorable effects on marriage in general could be substantial. Similarly, the priest-penitent privilege, at least in part, aims to prevent courts from inflicting harm on the socially useful, private, and sacred relationships between members of the clergy and those who come to them for advice, counsel, and support. Thus, to prevent harm to these relationships and out of respect for the intimate nature of these communications, members of the clergy should be allowed to exercise the privilege on their own behalf.

103. See *supra* text accompanying notes 19-26.

104. See WRIGHT & GRAHAM, *supra* note 12 § 5612, at 71.

105. See *supra* text accompanying notes 19-26.

106. See LILLY, *supra* note 99, at 440.

107. See, e.g., CAL. EVID. CODE § 980 (West 1995); *Martin v. State*, 33 So. 2d 825, 827 (Miss. 1948) (Griffith, J., concurring); *People v. Sullivan*, 249 N.Y.S.2d 589, 591 (Sup. Ct. 1964). But see 8 WIGMORE, *supra* note 33, § 2340(1), at 670 (holding that because the privilege was designed to foster marital communication, only the communicating spouse needs to hold the privilege).

As yet, however, the identity of the holder of the priest-penitent privilege is far from settled.¹⁰⁸ State statutes recognizing the priest-penitent privilege differ in the manner in which they recognize the holder of the privilege, and there are a number of different ways of organizing a complete summary of them.¹⁰⁹ This Comment organizes the statutes into three groups: (1) those that clearly state the penitent holds the privilege, (2) those that clearly state both the penitent and the member of the clergy hold the privilege, and (3) those that do not clearly state who holds the privilege.

In seventeen states, the penitent's right to hold the privilege is clearly stated in the statute itself.¹¹⁰ These statutes, usually following the language of the proposed federal rule on the priest-penitent privilege, generally permit members of the clergy to exercise the privilege in a limited sense, in that the clergy can assert the privilege "on behalf of" a penitent.¹¹¹ A handful of jurisdictions explicitly add a restrictive phrase: a member of the clergy may exercise the privilege, "*but only on behalf of*" a penitent.¹¹²

In six states,¹¹³ both a penitent and a member of the clergy are expressly allowed by the statute to hold the privilege. Alabama has long

108. See BUSH & TIEMANN, *supra* note 16, at 143-47, 196-98; SCOTT N. STONE & RONALD S. LIEBMANN, TESTIMONIAL PRIVILEGES § 6.08 (1983); Mitchell, *supra* note 15, at 755; Reese, *supra* note 42, at 78-79; Yellin, *supra* note 16, at 137-38; see also Colombo, *supra* note 27, at 249-51 (arguing for dual ownership of the privilege). This Comment does not explore whether the clergy have a right to unilaterally waive the privilege.

109. See, e.g., Mitchell, *supra* note 15, at 755-60; Montone, *supra* note 27, at 283-85; Sipel, *supra* note 27, at 1134-36.

110. See ALASKA R. EVID. 506; ARK. R. EVID. 505; DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West Supp. 1998); HAW. R. EVID. 506; KAN. STAT. ANN. § 60-429 (1994); KY. R. EVID. 505; LA. CODE EVID. ANN. art. 511 (West 1995); ME. R. EVID. 505; MISS. CODE ANN. § 13-1-22 (Supp. 1997); NEB. REV. STAT. § 27-506 (1995); N.M. R. EVID. 11-506; N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); S.D. CODIFIED LAWS § 19-13-18 (Michie 1995); TEX. R. EVID. 505; WIS. STAT. § 905.06 (1995-96).

111. ALASKA R. EVID. 506; DEL. R. EVID. 505; FLA. STAT. ANN. § 90.505 (West Supp. 1998); HAW. R. EVID. 506; KAN. STAT. ANN. § 60-429 (1994); LA. CODE EVID. ANN. art. 511 (West 1995); MISS. CODE ANN. § 13-1-22 (Supp. 1997); NEB. REV. STAT. § 27-506 (1995); N.M. R. EVID. 11-506; WIS. STAT. § 905.06 (1995-96).

112. ARK. R. EVID. 505; KY. R. EVID. 505; ME. R. EVID. 505; N.D. R. EVID. 505; OKLA. STAT. ANN. tit. 12, § 2505 (West 1993); S.D. CODIFIED LAWS § 19-13-18 (Michie 1995); TEX. R. EVID. 505 (emphasis added).

113. Delaware might be considered as a seventh state with a statute explicitly allowing members of the clergy to exercise a privilege on their own behalf. While the privilege statute, DEL. R. EVID. 505, merely allows clergy to exercise the privilege "on behalf of" a penitent, see *supra* note 110, another statute excuses a priest who learns of suspected child abuse from a "sacramental confession" from the duty to report it. DEL. CODE ANN. tit. 16, § 909 (Supp. 1997).

recognized the right of both parties to hold the privilege.¹¹⁴ California has two statutes; one allowing for the "penitent" to exercise the privilege, and one allowing the "clergyman" to exercise it.¹¹⁵ Colorado recently (in 1988) expanded its privilege statute to allow members of the clergy to exercise the privilege.¹¹⁶ New Jersey, in the wake of a 1994 decision by its state supreme court ruling that only the clergy held the privilege,¹¹⁷ recently expanded its statutory provision to include the penitent.¹¹⁸ Ohio's general prohibition of testimony from clergy regarding confidential matters is lifted when the penitent expressly consents to disclosure, "except when the disclosure of the information is in violation of the clergyman's, rabbi's, priest's, or minister's sacred trust."¹¹⁹ Pennsylvania's statute expressly protects members of the clergy from being compelled to testify about certain confidential communications.¹²⁰ And although the Pennsylvania Supreme Court has yet to definitively construe its language, the Pennsylvania statute is similar to a New Jersey rule of evidence that was recently scrutinized by the New Jersey Supreme Court.¹²¹ In *State v. Szemple*,¹²² the court held the statute conferred the right to hold the privilege on the clergyman alone.¹²³

In the remaining twenty-seven states,¹²⁴ the privilege statute does not

114. See ALA. R. EVID. 505.

115. Compare CAL. EVID. CODE § 1033 (West 1995) (penitent), § 1034 (West 1995) (clergy), with CAL. EVID. CODE § 993 (West 1995) (only patient or his or her representative may hold the physician-patient privilege).

116. See COLO. REV. STAT. ANN. § 13-90-107(1)(c) (West 1997).

117. See *State v. Szemple*, 640 A.2d 817 (N.J. 1994).

118. See N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1998).

119. OHIO REV. CODE ANN. § 2317.02(C) (Anderson Supp. 1998).

120. See 42 PA. CONS. STAT. ANN. § 5943 (West 1982). The modifying phrase "without consent of such person," because of the surrounding punctuation, appears to apply only to the words "or allowed." *Id.*

121. For a discussion of the New Jersey Supreme Court's analysis of this rule of evidence, see generally Montone, *supra* note 27.

122. 640 A.2d 817 (N.J. 1994).

123. See *id.* at 825.

124. See ARIZ. REV. STAT. ANN. § 13-4062 (West 1989); CONN. GEN. STAT. ANN. § 52-146b (West 1991); GA. CODE ANN. § 24-9-22 (1995); IDAHO CODE § 9-203(3) (Supp. 1997); 735 ILL. COMP. STAT. 5/8-803 (West 1992); IND. CODE ANN. § 34-46-3-1 (Michie 1998); IOWA CODE ANN. § 622.10 (West Supp. 1998); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1989); MASS. GEN. LAWS ch. 233, § 20A (1986); MICH. COMP. LAWS ANN. § 600.2156 (West 1986); MINN. STAT. ANN. § 595.02(1)(c) (West Supp. 1998); MO. ANN. STAT. § 491.060(4) (West 1996); MONT. CODE ANN. § 26-1-804 (1997); NEV. REV. STAT. ANN. § 49.255 (Michie 1996); N.H. REV. STAT. ANN. § 516:35 (1997); N.Y. C.P.L.R. 4505 (Consol. 1978); N.C. GEN. STAT. § 8-53.2 (1996); OR. REV. STAT. § 40.260 (1997); R.I. GEN. LAWS § 9-17-23 (1997); S.C. CODE ANN. § 19-11-90 (Law Co-op. 1985); TENN. CODE ANN. § 24-1-

clearly indicate who holds the privilege. While the identity of the holder may sometimes be inferred, with varying degrees of difficulty, from other language in the statute, not all states have had their judiciaries construe the statutory language. Thus, some confusion still exists.¹²⁵

One writer described four distinct categories into which these privilege statutes could fall.¹²⁶ The first consists of statutes that declare clergy may not testify as to confidential communications.¹²⁷ Statutes like these seem to be more rules of witness competency than rules of privilege, and seemingly do not allow anyone to waive them.¹²⁸ A second category of statutes includes those that state a member of the clergy may not disclose without the penitent's consent,¹²⁹ apparently bestowing the penitent alone with the power to invoke or waive the privilege.¹³⁰ Statutes in the third category indicate clergy shall not be compelled to testify,¹³¹ implying that members of the clergy alone hold the privilege.¹³²

206 (Supp. 1997); UTAH CODE ANN. § 78-24-8(3)(1997); VT. STAT. ANN. tit. 12, § 1607 (1973); VA. CODE ANN. § 8.01-400 (Michie Supp. 1997); WASH. REV. CODE ANN. § 5.60.060(3) (West Supp. 1998); W. VA. CODE § 57-3-9 (1997); WYO. STAT. ANN. § 1-12-101(a)(ii) (Michie 1997).

125. See generally Mitchell, *supra* note 15, at 755-60.

126. See *id.* at 755 n.181.

127. See GA. CODE ANN. § 24-9-22 (1995); IND. CODE ANN. § 34-46-3-1 (Michie 1998); MICH. COMP. LAWS ANN. § 600.2156 (West 1986); MO. ANN. STAT. § 491.060(4) (West 1996); VT. STAT. ANN. tit. 12, § 1607 (1973); WYO. STAT. ANN. § 1-12-101(a)(ii) (Michie 1997).

128. See Mitchell, *supra* note 15, at 755 n.181.

129. See ARIZ. REV. STAT. ANN. § 13-4062 (West 1989); CONN. GEN. STAT. ANN. § 52-146b (West 1991); IDAHO CODE § 9-203(3) (Supp. 1997); IOWA CODE ANN. § 622.10 (West Supp. 1998); MASS. GEN. LAWS ch. 233, § 20A (1986); MINN. STAT. ANN. § 595.02(1)(c) (West Supp. 1998); MONT. CODE ANN. § 26-1-804 (1997); NEV. REV. STAT. ANN. § 49.255 (Michie 1996); N.Y. C.P.L.R. 4505 (Consol. 1978); N.C. GEN. STAT. § 8-53.2 (1996); OR. REV. STAT. § 40.260 (1997); R.I. GEN. LAWS § 9-17-23 (1997); UTAH CODE ANN. § 78-24-8(3) (1997); WASH. REV. CODE ANN. § 5.60.060(3) (West Supp. 1998). But see *Ryan v. Ryan*, 642 N.E.2d 1028, 1034 (Mass. 1994) (holding, *inter alia*, that "priest-penitent" privilege, unlike most other evidentiary privileges, is "absolute").

130. See Mitchell, *supra* note 15, at 755 n.181.

131. See 735 ILL. COMP. STAT. ANN. 5/8-803 (West 1992); MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1989); VA. CODE ANN. § 8.01-400 (Michie Supp. 1997).

132. See Mitchell, *supra* note 15, at 755 n.181; see also *Seidman v. Fishburne-Hudgins Educ. Found., Inc.*, 724 F.2d 413, 415 (4th Cir. 1984) (holding that the "plain meaning of the [Virginia] statute grants the privilege only to the minister, priest or rabbi, not to the penitent or lay communicant"). The court acknowledged that "most penitent-priest" statutes in other jurisdictions require the consent of the penitent for disclosure, but insisted that Virginia's statute was different, *id.* at 416, and that it is up to the priest's "conscience to decide when disclosure is appropriate." *Id.* But see *People v. Burnidge*, 664 N.E.2d 656, 659 (Ill. App. Ct. 1996) (holding the privilege belonged both to the penitent and the member of the clergy).

The fourth category of statutes includes those that say members of the clergy shall not be compelled to testify without the penitent's consent,¹³³ implying that both parties must object to disclosure before the privilege applies.¹³⁴

Despite these variances among the state laws, a federal district court in 1985 summarily claimed, in *Eckmann v. Board of Education*,¹³⁵ that most states vested this privilege with the cleric. The court went on to hold that members of the clergy were the proper holders of the privilege under federal common law, though it acknowledged that other federal courts had not yet arrived at the same conclusion.¹³⁶ Although this claim would be difficult to sustain given the subtleties in the statutes as noted above, this decision suggests an important development in the recognition at the federal level of this privilege.¹³⁷

But even in the absence of a law clearly recognizing the clergy as a holder of the privilege, very few courts throughout U.S. history have compelled clerics to reveal confidential statements made to them in their capacity as ministers.¹³⁸ Judges and lawyers are often reluctant to turn clerics into informers, let alone martyrs.¹³⁹ Some have argued this reluctance on the part of judicial officers to appear hostile is one reason why the right of clerics to refrain from testifying is so seldom challenged in practice. Thus, one noted pair of commentators on the subject recommends members of the clergy refuse to testify even when grounds for

133. See N.H. REV. STAT. ANN. § 516:35 (1997); S.C. CODE ANN. § 19-11-90 (Law Co-op. 1985); TENN. CODE ANN. § 24-1-206 (Supp. 1997); W. VA. CODE § 57-3-9 (1997).

134. See Mitchell, *supra* note 15, at 755 n.181. But see *New Hampshire v. Melvin*, 564 A.2d 458 (N.H. 1989) (holding that the defendant waived the right to invoke the privilege because he made the statements in the presence of the minister's wife); *Vermilye v. State*, 754 S.W.2d 82, 86 (Tenn. Crim. App. 1987) (holding that the privilege protects the penitent, not the minister).

135. 106 F.R.D. 70, 73 (E.D. Mo. 1985).

136. See *id.*

137. See Mitchell, *supra* note 15, at 760.

138. See WRIGHT & GRAHAM, *supra* note 12, § 5612, at 51; see also *State v. Motherwell*, 788 P.2d 1066 (Wash. 1990) (reversing a conviction of an ordained minister while upholding convictions of two non-ordained "religious counselors" for violating a child abuse reporting statute).

139. For examples of the negative backlash that can accompany efforts to compel members of the clergy to testify, see WILLIAM HAROLD TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED COMMUNICATION AND THE PASTOR* 24-29 (1964). The life of the 14th century priest and martyr St. John Nepomucen illustrates how far one government was willing to go to gain access to a confession, and the resolve of a Catholic priest to never break the seal. After John refused to divulge the contents of the Queen's confession, King Wenceslaus IV ordered the priest to be tortured, murdered, and thrown into the Moldau River at Prague. See JOHN J. DELANEY, *DICTIONARY OF SAINTS* 324 (1980).

the privilege are not immediately apparent and the duty of confidentiality far from certain.¹⁴⁰

Nevertheless, in the wake of emotionally charged cases involving child abuse or sexual violence, there is often intense pressure to require testimony from all available parties, even if that means forcing members of the clergy to reveal confidential communications.¹⁴¹ Thus, to the extent these communications will be protected by law, arguments supporting the right of a member of the clergy to refuse to testify need to be articulated.

III. RIGHT OF MEMBERS OF THE CLERGY TO HOLD THE PRIVILEGE

In *Mockaitis v. Harclerod*,¹⁴² a Ninth Circuit panel relied in part on the Religious Freedom Restoration Act (RFRA) in ruling that the rights of a Catholic priest to keep the secrecy of the confessional had been violated.¹⁴³ Two recent law review articles on the privilege also relied heavily on RFRA in arguing that members of the clergy have a free exercise right to hold the privilege.¹⁴⁴

In June of 1997, however, the United States Supreme Court struck down RFRA¹⁴⁵ on the grounds that it exceeded Congress's enforcement powers under Section Five of the Fourteenth Amendment.¹⁴⁶ Thus, a reevaluation of the constitutionality of the priest-penitent privilege is necessary.

Some have argued that the "right to privacy" found emanating from the penumbras of the Constitution in *Griswold v. Connecticut*¹⁴⁷ provides a constitutional basis for protecting certain confidential communications.¹⁴⁸ One scholar notes that on the relatively few occasions this

140. See BUSH & TIEMANN, *supra* note 16, at 205-09.

141. See, e.g., *Commonwealth v. Kane*, 445 N.E.2d 598 (Mass. 1983) (upholding conviction and fining of priest for refusing to divulge the contents of a confidential communication when the defendant-penitent in a child abuse case waived the privilege); *In re Williams*, 152 S.E.2d 317 (N.C. 1967), *cert. denied*, 388 U.S. 918 (1967) (holding Baptist minister in contempt of court for refusing to testify against a defendant accused of rape).

142. 104 F.3d 1522 (9th Cir. 1997).

143. See *supra* text accompanying notes 9-10.

144. See Montone, *supra* note 27, at 282; Sippel, *supra* note 27, at 1151-52.

145. While it is generally understood that RFRA has been struck down insofar as it applies to the states, whether RFRA still applies to the federal government is still an open question. At least two bankruptcy courts have held that it does. See, e.g., *Christian v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998); *In re Saunders*, 215 B.R. 800 (Bankr. D. Mass. 1997).

146. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170-71 (1997).

147. 381 U.S. 479 (1965).

148. See, e.g., RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN

argument has succeeded, the confidential communications have dealt with issues of personal autonomy in family matters, not secrecy in general.¹⁴⁹ Thus, an argument that clergy are entitled to the privilege under the Constitution must stand on firmer ground than that provided by the right to privacy. That firmer ground is the Free Exercise Clause of the First Amendment.¹⁵⁰

A. Clergy's Right to the Privilege Under the U.S. Constitution

The first known case in this country recognizing the priest-penitent privilege did so on First Amendment grounds.¹⁵¹ Since then, however, no other case seems to have done likewise,¹⁵² although scholars have argued that the Free Exercise Clause should protect members of the clergy from compelled disclosure of confidential communications.¹⁵³ Arguing that the Free Exercise Clause provides the basis for a member of the clergy to hold the priest-penitent privilege has never been without its difficulties,¹⁵⁴ but is made even more difficult in light of the higher threshold set by recent Supreme Court decisions for free exercise claims.¹⁵⁵ Nevertheless, because the issues are so important and the burdens placed on claimants so severe, a free exercise argument needs to be made.

If their right to hold the privilege is not recognized, members of the clergy could face the burden of having to choose between obeying the dictates of their conscience or an order of a court. Their right to the free exercise of their religion in safeguarding communications they hold

APPROACH TO EVIDENCE 614-15 (2d ed. 1982); Charles L. Black, Jr., *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48-49; Jolyan A. Butler, Note, *Psychotherapy and Griswold: Is Confidence a Privilege or Right?*, 3 CONN. L. REV. 599 (1971).

149. See Mitchell, *supra* note 15, at 773-74.

150. "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ." U.S. CONST. amend. I.

151. See *supra* text accompanying notes 62-66.

152. See BUSH & TIEMANN, *supra* note 16, at 116. Some courts have avoided tackling the question. See, e.g., *Church of Jesus Christ of Latter-Day Saints v. Superior Ct.*, 764 P.2d 759, 768 (Ariz. Ct. App. 1988) (refusing to rule on clergyman's constitutional right to assert the privilege because of insufficient evidence in the record of the extent of the clergyman's duty of non-disclosure under his religion's laws). The Supreme Court of Utah appears to have come the closest to recognizing a cleric's First Amendment right to assert the priest-penitent privilege. See *Scott v. Hammock*, 870 P.2d 947, 954 (Utah 1994) ("[T]he constitutional right to the free exercise of religion strongly suggests that the privilege should be recognized when clergy perform the functions required of them.").

153. See, e.g., Mitchell, *supra* note 15, at 793-821.

154. See *id.* at 795.

155. See *infra* text accompanying notes 161-78.

as protected under the laws of their church and sacred in the sight of God might be seriously obstructed if courts could compel their testimony.¹⁵⁶ Further, members of the clergy who are expected by their faith communities to make themselves available for confidential colloquies might find it impossible to find work or otherwise exercise their ministry if it became known that clergy could be compelled by the government to assume the role of informants against members of a congregation. And as the facts of the *Mockaitis* case show, the rights of a cleric are not adequately safeguarded if the penitent alone holds the privilege.¹⁵⁷

Whether clergy may assert the privilege is not simply a matter of concern for an individual penitent and a particular member of the clergy. Some have argued that the religious freedom of all members of a religion could be compromised if their clergy could be compelled to reveal confidential communications.¹⁵⁸ Cardinal Bevilacqua, the Catholic archbishop of Philadelphia, argues that although the good of the penitent is the "obvious" purpose of sacramental confession, "[t]he other, more fundamental, purpose of the sacramental seal is the protection of the Sacrament of Penance itself."¹⁵⁹ Bevilacqua warns:

Were the Sacrament rendered difficult or odious to the faithful they would be deterred from approaching it, thereby undermining the Sacrament itself to the great spiritual harm of the faithful, as well as to the entire Church. For this reason, the Church has always scrupulously protected confessional communications, treating them as the confidential relations of individuals with God, mediated through the priest in the Sacrament of Penance.¹⁶⁰

1. The Free Exercise Clause

Before 1990, the United States Supreme Court generally used a four-step analysis, which had been developed in a string of famous

156. Even Jeremy Bentham, the renowned English jurist who generally opposed any rule of privilege, made an exception for Catholic priests. See WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM & WIGMORE* 99 (1985). He noted that compelling clerics to disclose confidential communications would violate one of their "most sacred . . . religious duties." 4 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 588 (1st ed. 1827), quoted in MUELLER & KIRKPATRICK, *supra* note 28, § 5.38, at 632 n.4.

157. See *supra* text accompanying notes 1-10.

158. See, e.g., Anthony Cardinal Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733 (1996).

159. *Id.* at 1736.

160. *Id.* at 1736-37.

cases, when evaluating free exercise claims.¹⁶¹ Claimants asserting their rights guaranteed under the First Amendment to the Constitution had to (1) prove that the regulated or prohibited practice or conduct was motivated by or stemmed from sincerely held religious beliefs, and (2) demonstrate that the state regulation actually burdened those practices.¹⁶² It was then up to the state to show (3) that a "compelling state interest" justified the burden on the belief in question, and (4) that the burden was the "least restrictive means" of achieving that interest.¹⁶³

In *Employment Division v. Smith*,¹⁶⁴ the Supreme Court held that the Free Exercise Clause allowed a state to ban the use of the drug peyote, even if the ban applied to those who used the drug during religious rituals.¹⁶⁵ The Court conceded that when the government prohibits conduct only when the conduct is engaged in for religious purposes, the Free Exercise Clause is violated.¹⁶⁶ The Court concluded, however, that the Clause was not violated when the burden placed on a religious practice was not the object of the government, but simply an "incidental effect" of a "generally applicable" law.¹⁶⁷ Thus, the Free Exercise Clause means that citizens are not excused from their duty to comply with a general law that either forbids or mandates conduct that their religion might happen to command or prohibit.¹⁶⁸ The Court went on to state that "the mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."¹⁶⁹ Thus, the Court concluded, such general laws will not be subject to strict scrutiny under the Free Exercise Clause.¹⁷⁰

In the wake of the *Smith* decision, then, persons claiming that their free exercise rights have been violated must carry a heavier burden than they did under the previous line of cases. And as rules requiring "every man's evidence"¹⁷¹ seem to be religiously neutral and generally applica-

161. See *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

162. See *Thomas*, 450 U.S. at 716-18.

163. *Id.* at 718.

164. 494 U.S. 872 (1990).

165. See *id.* at 890.

166. See *id.* at 877-78.

167. *Id.* at 878.

168. See *id.* at 879.

169. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940)).

170. See *id.* at 882.

171. See, e.g., *Doyle v. Hofstadter*, 257 N.Y. 244, 275 (1931) (Pound, J., dissenting)

ble, the right of members of the clergy to assert the priest-penitent privilege on their own behalf and refuse to testify would appear to be in some jeopardy. But two lines of argument within the *Smith* decision itself may provide the means around this apparent obstacle.

An exception to the arguably harsh rule in *Smith* occurs when members of the clergy exercise their right as holders of the priest-penitent privilege, because then the right to the free exercise of one's religion is not the only right involved. Rather, this free exercise right is coupled with other constitutional protections such as the right against compelled expression¹⁷² or perhaps even the right of a father—albeit a spiritual one—to oversee the religious formation of his children.¹⁷³ Such “coupling” of rights for a “hybrid” claim would seem to satisfy *Smith*, which rejected the Native Americans' claims in part because their free exercise claims were “unconnected with any communicative activity or parental right.”¹⁷⁴ If members of the clergy are compelled to testify against their consciences or forced to choose between violating a court order or the rules of their religious traditions, their free exercise of religion is obviously hampered. By tying that claim to one or both of the other constitutional rights mentioned, claimants could allay the concern of the *Smith* Court that democratic government would become impossible if every citizen could refuse to obey laws by simply claiming that the law conflicted with their religious beliefs.¹⁷⁵

Granted, the right against compelled expression in this context has not been recognized universally or without qualification.¹⁷⁶ But if free exercise claims are only valid when “coupled” with another right, which standing by itself would merit strict scrutiny anyway, then in effect the free exercise claim has been rendered inconsequential.¹⁷⁷

The second way in which a member of the clergy could claim a free

(“The public has a claim to every man's evidence unless the witness is specially exempted and protected by law.”).

172. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). Being forced to testify might be, under some circumstances, a violation of a person's free speech rights.

173. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (preventing government interference in the “liberty of parents and guardians to direct the upbringing and education of children under their control.”).

174. *Smith*, 494 U.S. at 882.

175. See *id.*

176. See, e.g., *Barnette*, 319 U.S. at 645 (Murphy, J., concurring) (suggesting certain freedoms are subject to the duty to testify in court).

177. See generally Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the “Hybrid Situation” in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993).

exercise right to hold the priest-penitent privilege, even under *Smith*, is by reference to the special nature of the government assessment necessary in these circumstances. In *Smith*, the Court held that it would apply a different free exercise analysis (referred to as "the *Sherbert* test") only when circumstances dictated an "individualized governmental assessment of the reasons for the relevant conduct."¹⁷⁸ Like the unemployment compensation cases under the *Sherbert* line, the circumstances surrounding a priest-penitent claim invite a particularized government assessment. A court would have to consider whether a particular cleric of a particular denomination must reveal the contents of an allegedly confidential communication from a particular penitent.¹⁷⁹

Even if free exercise claimants succeed in negotiating the formidable hurdle posed by *Smith*, they would still need to answer the objection posed by some that the priest-penitent privilege violates another provision of the First Amendment—the Establishment Clause.¹⁸⁰

2. The Establishment Clause Objection

The Supreme Court has held that the Establishment Clause¹⁸¹ of the First Amendment prohibits all governmental bodies from either favoring a particular religion¹⁸² or even aiding religion in general.¹⁸³ But this is not to say that government may not "accommodate religious practices."¹⁸⁴ In spite of the Court's favorable references to the priest-

178. *Smith*, 494 U.S. at 884.

179. See, e.g., *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir. 1997) (explaining the particular nature of the Sacrament of Penance in the Catholic Church); *Magar v. State*, 826 S.W.2d 221 (Ark. 1992) (refusing to recognize a privilege because a cleric testified that confession was not a tenet or practice of his particular denomination).

180. See, e.g., Robert L. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27, 59-62 (1967); Horner, *supra* note 27, at 721-28; Jane E. Mayes, Note, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L. J. 397, 423 (1987).

181. "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

182. See, e.g., *Larson v. Valente*, 456 U.S. 228, 244-46 (1982) (holding the Establishment Clause's "clearest command" is "that one religious denomination cannot be officially preferred over another"); *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (holding that the Establishment Clause applies to the states via the Fourteenth Amendment).

183. See, e.g., *School Dist. v. Schempp*, 374 U.S. 203, 216 (1963) (claiming the Court had "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *Everson*, 330 U.S. at 15 (ruling that neither state nor federal government may pass laws aiding one religion or all religions).

184. *Board of Educ. v. Grumet*, 512 U.S. 687, 705-06 (1994) (providing that the government "may (and sometimes must) accommodate religious practices . . . without violating

penitent privilege,¹⁸⁵ some have asked whether the privilege is unconstitutional in light of the Establishment Clause.¹⁸⁶

What test the Court uses when applying the Establishment Clause is no longer clear. The famous *Lemon*¹⁸⁷ test has come under fire from several of the justices,¹⁸⁸ and at least two other tests, or "refinements" of *Lemon*, have been proposed.¹⁸⁹ Thus, this Comment will examine the priest-penitent privilege in light of each of these three tests.

Under *Lemon*, a statute will run afoul of the Establishment Clause if it fails to pass any one of the test's three prongs. First, it must have a "secular legislative purpose;" second, its principal effect must be one that "neither advances nor inhibits religion;" third, it must not foster "an excessive government entanglement with religion."¹⁹⁰

While some have assumed that the religious nature of the priest-penitent privilege violates the first prong of the *Lemon* test,¹⁹¹ a reasonable argument can be made that it does not. The Advisory Committee

the Establishment Clause" (citations omitted)). The Court also stated that states can provide "benevolent neutrality" to religious practices "without sponsorship and without interference." *Id.* at 705.

185. See, e.g., *Totten v. United States*, 92 U.S. 105, 107 (1875). See *supra* notes 51-60 and accompanying text.

186. See, e.g., MCCORMICK ON EVIDENCE § 76.2, at 109 (John William Strong et al. eds., 4th ed. 1992) (declaring that it is an "open question" whether the clergy privilege is constitutional); Stoyles, *supra* note 180 (concluding that the privilege is, in fact, unconstitutional); Horner, *supra* note 27, at 728 (arguing that the privilege "technically" violates the Establishment Clause).

187. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

188. At least four of the current justices have expressed some discomfort with the *Lemon* test. Justice Scalia has agreed with the "long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring). Justice Kennedy has suggested the *Lemon* test should not be the "primary guide" in Establishment Clause jurisprudence. *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring). Chief Justice Rehnquist has claimed the *Lemon* test has "no more grounding in the history of the First Amendment than does the wall theory upon which it rests." *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting). Justice O'Connor's position on the *Lemon* test is unclear since issuing a "clarification" of it in *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring), and further discussing it in her concurrence in *Grumet*, 512 U.S. at 717-21 (O'Connor, J., concurring).

189. Justice O'Connor explains the "endorsement" test in her concurrences in *Lynch*, 465 U.S. at 688-94, and *County of Allegheny v. ACLU*, 492 U.S. at 627-32. Justice Kennedy's dissent in the latter case contains his suggested "coercion" test, *id.* at 655-67, and his majority opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), explains it in more detail.

190. *Lemon*, 403 U.S. at 612-13.

191. See, e.g., Horner, *supra* note 27, at 723 (arriving at the "inescapable conclusion" that the privilege lacks a secular legislative purpose).

that drafted Federal Rule of Evidence 506, for example, pointed out that the priest-penitent privilege could avoid Establishment Clause problems if it were based on the "same considerations which underlie the psychotherapist-patient privilege."¹⁹² A secular purpose for the priest-penitent privilege might be the promotion of spiritual confessions primarily because of their value to the mental health of individuals within a community.¹⁹³ A provision guaranteeing the clergy status as holders guarantees two things in furtherance of this secular purpose: (1) potential penitents will know that their clergy also have the right to remain silent about these communications, and (2) clergy will make themselves available for these beneficial conferences *knowing they will not be forced to testify about them*.

Some scholars have maintained that the priest-penitent privilege fails the second prong of the *Lemon* test because its "primary effect" is the advancement of religion in general, if not those particular religions that require confession.¹⁹⁴ The Court has let stand, however, laws that benefit religious groups when that benefit is shared with other similarly situated groups.¹⁹⁵ On this basis, one might argue that current privileges for other professions that promote mental health¹⁹⁶ negate any argument of special support of religion in particular.¹⁹⁷ Extending the right to hold the privilege to clergy of all denominations, rather than just those that require confidentiality,¹⁹⁸ would seem to satisfy this prong.¹⁹⁹ In any

192. Advisory Committee's Note, Rejected Rule 506(b), *quoted in* WRIGHT & GRAHAM, *supra* note 12, § 5612, at 68 n.283.

193. *See* Mitchell, *supra* note 15, at 782; *see also* K. Lianne Wallace, Note, *Privileged Communications In Sexual Assault Cases: Rhode Island's Treatment of Clergyman-Parishioner and Psychotherapist-Patient Communications*, 28 SUFFOLK U. L. REV. 433, 464 (1994).

194. *See, e.g.*, WRIGHT & GRAHAM, *supra* note 12, § 5612, at 71.

195. *See, e.g.*, *Agostini v. Felton*, 117 S. Ct. 1997, 2016 (1997).

196. *See, e.g.*, *Jaffee v. Redmond*, 116 S. Ct. 1923, 1931-32 (1996).

197. *See* Mitchell, *supra* note 15, at 784; *see also* *Scott v. Hammock*, 870 P.2d 947, 954 (Utah 1994) (referring to the psychotherapist-patient privilege as the "secular analogue" to the priest-penitent privilege). *But see* WRIGHT & GRAHAM, *supra* note 12, § 5612, at 71 (arguing that the priest-penitent privilege is unique in that it is absolute, whereas the other privileges are not).

198. Several legal commentators have repeated the erroneous statement that Catholic priests may divulge the contents of a sacramental confession upon the consent of the penitent. This is simply untrue, as Canon Law clearly indicates the sacramental seal is inviolable. *See* 1983 CODE c.983, §§ 3, 4; *see also* THE CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, *THE CANON LAW: LETTER & SPIRIT* 535 (1995) ("The use of the Latin word *ne-fas* ('absolutely wrong') shows how seriously the norm of this canon is regarded. Put simply, the priest is strictly forbidden to reveal by any means whatever anything the penitent may have disclosed to him. Even the penitent cannot release him from this obligation.").

case, courts have acknowledged that many religions today recognize the confidential nature of communications made between their adherents and members of their clergy.²⁰⁰

Another possible justification of the privilege that would satisfy this second prong of *Lemon* may be seen by drawing an analogy to exemptions from military service.²⁰¹ The Establishment Clause objection—that recognizing clergy as holders of the privilege has the primary effect of advancing religion—can be answered as follows: The Court has construed the exemption from military service broadly enough so that even non-theistic objections will suffice, so long as they are spiritually based, conscientious, and spring from something more than mere pragmatism. When dealing with the priest-penitent exemption, the Court could construe it broadly enough to allow any similarly motivated objection of a cleric to testify.²⁰²

The third prong of the *Lemon* test is, arguably, the easiest for the privilege to satisfy. While some “entanglement” between government and religion would obviously be involved when adjudicating privilege

The error seems to have originated in an unreferenced assertion in the first edition of Tiemann's oft-cited work, *THE RIGHT TO SILENCE*, *supra* note 139, at 124. It also appears in his second edition. See WILLIAM HAROLD TIEMANN & JOHN C. BUSH, *THE RIGHT TO SILENCE* 193 (2d ed. 1983). Significantly, his third edition modifies the offending passage considerably and removes the erroneous statement. See BUSH & TIEMANN, *supra* note 16, at 197. Sadly, however, this misstatement of the Catholic position has found its way into the legal literature, probably because of the strong influence of Tiemann's first two books. See, e.g., WRIGHT & GRAHAM, *supra* note 12, § 5612, at 206, n.6.

Recently, a high-ranking Catholic leader offered the following statement on this subject:

That which the priest learns in the confessional, he knows uniquely as the representative of God, and not at all through human knowledge or communication; he should completely detach himself from (such knowledge); it is as if he knows nothing. It is necessary that the faithful have the most absolute confidence in the perfect discretion of confessors. Also the secret is more rigid than any other and never permits the least exception.

Bevilacqua, *supra* note 158, at 1735-36 (citation omitted).

199. Under *Larson v. Valente*, 456 U.S. 228, 246 (1982), the “principle of denominational neutrality” might be violated if the law recognized clerics from only certain specific religions as holders of the privilege. See also Rev. Martin R. Bartel, OSB, *Pennsylvania's Clergy-Communicant Privilege: For Everything There Is . . . A Time to Keep Silent*, 69 *TEMPLE L. REV.* 817, 822-23 (1996) (arguing that a broad definition of clergy would be more likely to pass constitutional muster with the courts).

200. See, e.g., *State v. Szemple*, 640 A.2d 817, 826 (N.J. 1994) (discussing confidentiality policies of several religions).

201. See WRIGHT & GRAHAM, *supra* note 12, § 5612, at 71-72.

202. See *id.* Whether someone can be a member of a “clergy” in a “non-theistic” religion, however, would be an open question.

claims, it is unlikely it would become "excessive," especially in light of the thorny problems that are almost certain to arise in the absence of the privilege and the right of a member of the clergy to assert it.²⁰³ Other Supreme Court decisions have held that the Establishment Clause does not mandate the absence of all contact between government and religion.²⁰⁴ And in light of judicially approved military or legislative chaplaincies, where clerics are supervised and paid by the government, it seems likely that a testimonial privilege involving significantly less entanglement would be permitted.²⁰⁵

Under one of two possible alternatives to *Lemon* the Court has used, the "endorsement" test proposed by Justice O'Connor in *Lynch v. Donnelly*,²⁰⁶ government action is unconstitutional if its "actual purpose is to endorse or disapprove of religion" or "in fact conveys a message of endorsement or disapproval."²⁰⁷ In *Lynch*, the Court held that a Christmas creche in a city park did neither, given that other holiday displays were placed alongside the Christmas creche and that such displays had been used for so long that members of the public would not find the practice to be an endorsement of religion.²⁰⁸ The priest-penitent privilege seems to satisfy both of these concerns. The privilege appears in evidence codes alongside other privileges, and, more importantly, has been in use for so long and with so few objections that its uniquely religious significance has diminished, or at least that the evils the Establishment Clause seeks to prevent are in no danger of arising.²⁰⁹

Under a second alternative to *Lemon*, the "coercion" test employed

203. It is conceivable that many courts would face the unenviable task of routinely either forcing religious figures to testify or holding them in contempt of court. *But see* WRIGHT & GRAHAM, *supra* note 12, § 5612, at 75 (arguing that "the precedents do not support a clear-cut decision either way, whether the question is this last [third] element or the *Lemon* test in its entirety.").

204. *See, e.g.,* Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970) (allowing property tax exemptions for religious organizations, in part because of the excessive entanglement between government and religion that would arise in their absence).

205. *See* Mitchell, *supra* note 15, at 784-85; *see also* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (recognizing constitutionality of a state legislative chaplain).

206. 465 U.S. 668 (1984).

207. *Id.* at 690 (O'Connor, J., concurring).

208. *See id.* at 692-94 (O'Connor, J., concurring). Some constitutional law scholars reason that long-accepted practices which would be otherwise suspect are sometimes permitted because history has shown "no significant danger of eroding governmental neutrality regarding religious matters." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1166 (4th ed. 1991). Another scholar attributes this permissive attitude to a gradual loss of the uniquely religious significance of the practice. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1224 (2d ed. 1988).

209. *See* WRIGHT & GRAHAM, *supra* note 12, § 5612, at 76.

by the Court in *Lee v. Weisman*,²¹⁰ the priest-penitent privilege and the right of members of the clergy to assert it on their own behalf seem to be safe. The coercion test guarantees that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"²¹¹ While the Court held that a school-sponsored prayer violated this test,²¹² a recognition of the privilege and its holder, far from coercing religious faith, merely accommodates it.

Even if one concludes that recognizing a member of the clergy as holder of the priest-penitent privilege runs counter to the spirit of the Establishment Clause, many scholars have argued that free exercise accommodations serve as a "carve out" exception to the Establishment Clause, or at the very least as a middle ground that is neither mandated by the Free Exercise Clause nor prohibited by the Establishment Clause.²¹³

B. Clergy's Right to the Privilege Under State Constitutions

Even if the right of a member of the clergy is not recognized under the federal constitution, and as long as it is not seen as violating the Establishment Clause, claimants might also find relief under state constitutions, which are free to construe any Free Exercise Clauses contained therein more broadly than the U.S. Supreme Court construed the First Amendment in *Smith*.²¹⁴

When evaluating free exercise claims under their state constitutions, some state courts²¹⁵ still employ the four-pronged test the United States Supreme Court used before *Employment Division v. Smith*.²¹⁶ Under this test, claimants had to (1) prove that the regulated or prohibited practice or conduct was motivated by or stemmed from sincerely held religious beliefs, and (2) demonstrate that the state regulation actually

210. 505 U.S. 577 (1992).

211. *Id.* at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

212. *See id.* at 599.

213. *See, e.g.,* WRIGHT & GRAHAM, *supra* note 12, § 5612, at 66; Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 900 (1994).

214. *See, e.g.,* *State v. Motherwell*, 788 P.2d 1066, 1074 (Wash. 1990) (acknowledging that state constitutional provisions may be applied "more strictly than parallel federal provisions"); *see also supra* notes 161-66 and accompanying text.

215. *See, e.g.,* *State v. Miller*, 549 N.W.2d 235, 239 (Wis. 1996) ("[O]ur analysis of the freedom of conscience as guaranteed by the Wisconsin Constitution is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision.").

216. 494 U.S. 872 (1990).

burdened those practices.²¹⁷ It was then up to the state to show (3) that a "compelling state interest" justified the burden on the belief in question, and (4) that the burden was the "least restrictive means" of achieving that interest.²¹⁸

Most members of the clergy would have little problem asserting the first prong; namely, that their belief that the sanctity of the revealed communication is threatened by a compelled revelation is both sincere and religiously motivated.²¹⁹ Similarly, most religious organizations could, without a great deal of difficulty, make a showing that their practice of confidential communications would be severely affected if it became known that members of the clergy could be forced to reveal the contents of those communications.²²⁰ On the other hand, clerics themselves might argue that their ability to offer such spiritual counseling would be adversely affected if the state could require such testimony under threat of civil or penal sanction.²²¹

Does the state have a compelling interest that overrides the First Amendment rights of a member of the clergy? It is difficult to say with certainty. Courts have long recognized that the state has a "right to everyman's evidence,"²²² and some commentators point to a string of cases that arguably mark out some of the limits of the priest-penitent privilege.²²³ Nevertheless, each of these cases can be distinguished on its facts.²²⁴ Furthermore, testimony sought from a member of the clergy does not necessarily contain any inherent guarantees of reliability. In fact, if a particular penitent knows a particular priest could be compelled to testify about the contents of his confession, it could be inher-

217. See *Thomas v. Review Bd.*, 450 U.S. 707, 716-18 (1981).

218. *Id.* at 718-19.

219. This claim, though easier to assert in a denomination with an established canon law, would certainly not be impossible for someone of a different religious persuasion. See *WRIGHT & GRAHAM*, *supra* note 12, § 5612, at 61-62; see also *Mitchell*, *supra* note 15, at 799-806.

220. But see *WRIGHT & GRAHAM*, *supra* note 12, § 5612, at 63 (claiming "it is doubtful if Roman Catholicism would be significantly burdened by the occasional disclosure of a penitential communication.").

221. This is essentially what Fr. Mockaitis claimed. See *Mockaitis v. Harclerod*, 104 F.3d 1522, 1526 (9th Cir. 1997).

222. See, e.g., *Doyle v. Hofstadter*, 257 N.Y. 244, 275 (1931) (Pound, J., dissenting) ("The public has a claim to every man's evidence unless the witness is specially exempted and protected by law.").

223. See *WRIGHT & GRAHAM*, *supra* note 12, § 5612, at 64-65.

224. In most of them, the member of the clergy demanding the privilege appeared to be involved in the wrongdoing under investigation. See *id.*

ently unreliable.²²⁵

The state's interest in gathering evidence for the administration of justice is obvious. Less obvious, however, is the right of the state to peek behind the veil of secrecy protecting communications between members of the clergy and the people they serve. The state can hardly demand evidence that, but for the existence of the confidential priest-penitent relationship, it never would have been able to acquire otherwise.

A government body would also seem to have a difficult time arguing that compelling testimony from a member of the clergy was the "least restrictive means" by which to gather evidence, especially given the presence of other testimonial privileges that are likely to involve more substantial communications.²²⁶ Furthermore, courts have tended to place a heavy burden on a government body asserting its need for testimony when First Amendment freedoms are involved.²²⁷

Thus, under the four-pronged analysis following the *Sherbert-Yoder-Thomas* line of cases and used in many states, members of the clergy should be able to assert their free exercise rights to act as holders of the priest-penitent privilege.

IV. CONCLUSION

This Comment has argued that members of the clergy should be recognized as holders of the priest-penitent privilege. Members of the clergy should not be forced to choose between following the law of their church and the law of their state. Those engaged in ministry should not have to curtail their sacred—and constitutionally protected—work in the face of threats from courts or administrative agencies. And members of the faithful should not have to fear that the confidential communications they entrust to their clergy can be forced into the open.

The contrary argument is, no doubt, often motivated by a desire to garner as much evidence as possible in order to help solve heinous crimes like the ones in *Mockaitis v. Harclerod*. Nevertheless, the sanctity of the confessional or other place of religious counsel is worthy of

225. As to the questionable sincerity of a criminal defendant, see the discussion of defendant Hale in the *Mockaitis* case, *supra* note 11. See also *State v. Szemple*, 622 A.2d 248, 254 n.5 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 640 A.2d 817 (N.J. 1994) (noting that "[d]ue to the belief in the usual truthfulness of facts told during the confession, the testimony of a clergyman concerning the confession might be given too much weight in reaching a finding.").

226. See *WRIGHT & GRAHAM*, *supra* note 12, § 5612, at 65 n.272.

227. See *Sippel*, *supra* note 27, at 1154 n.194.

constitutional protection. This is true not only because spiritual communications have therapeutic value, or even because wise counsel offered by caring ministers often can lead to criminals turning themselves in, but because the opportunity for confidential and cathartic confession may represent one of the last strongholds of privacy against the ever encroaching police power of the state. It may also serve as a fitting reminder to all ministers of justice in our society that they did not author justice, and will one day be responsible for the way in which they have administered it themselves.

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